

FILED
COURT OF APPEALS
DIVISION II

11 DEC 22 AM 10:53

STATE OF WASHINGTON
BY
DEPUTY

NO. 42366-9-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint of

ROBERT MARK DOBYNS,

Petitioner.

REPLY TO STATE'S RESPONSE TO

PERSONAL RESTRAINT PETITION

ROBERT M. QUILLIAN
ATTORNEY FOR PETITIONER
WSBA NO. 6836

2633-A Parkmont Lane SW
Olympia, WA 98502
(360)352-0166

In reply to the State's Response to Personal Restraint Petition, the Petitioner herein, ROBERT MARK DOBYNS, states as follows:

The parties to this action appear to agree on the standard required when alleging ineffective assistance of counsel. However, the parties drastically diverge in their respective interpretations of the application of that standard to the facts of the instant case. As might be expected, the State makes much of the standard argument that trial counsel's conduct during trial is entitled to great deference, and is afforded a presumption that such conduct constitutes legitimate trial tactics. See, e.g., State's Response, at pages 8, 12, and 16.

However, the "trial tactic/strategy" argument and response can only go so far, and the facts of the instant case present a situation far different from the scenarios presented in the cases cited by the State in its Response. One of the main cases cited by the State, *In re Davis*, 152 Wn. 2d 647, 101 P. 3d 1 (2004), clearly shows the distinction being urged here by the Petitioner.

In *Davis*, the Petitioner alleged numerous claims of ineffective assistance of counsel, many of them alleging failure to investigate the case, interview witnesses, or call expert witnesses. Yet, in response to virtually every claim made by the Petitioner, the Supreme Court was able to point to specific actions taken by defense counsel in contacting and consulting with expert witnesses, and in making well-informed tactical decisions as to whether to pursue a certain theory of defense in the case. In other words,

in *Davis*, as in the vast majority of cases dealing with claims of failure to investigate or consult with experts, the reviewing Court can point to specific matters in the record itself which tend to show that the concerns of the Petitioner are **factually** unfounded.

Such is not the case in the present case. Whereas there is rarely evidence in the trial record itself to support claims that trial counsel was deficient, there is ample evidence in the instant case that trial counsel was deficient. In considering this argument, one critical fact must be kept in mind: This trial boiled down to a credibility contest between the Petitioner and N.M., his accuser. There was little or no physical evidence, and very few exhibits offered at trial. This situation served to magnify the need for careful management of the case by defense counsel, and to seize upon every conceivable opportunity to call into question the testimony of N.M., and to corroborate the position of the Petitioner/Defendant. While the arguments set forth in the original Personal Restraint Petition will not be repeated in full, the following reply must be made:

Issues Concerning Computers and Computer Images

There was much discussion and testimony in the case of allegations that Dobyns viewed pornographic images on the home computer while with N.M., and that some of the inappropriate touching and conduct occurred while N.M. was sitting in Dobyns' lap during the viewing sessions. This whole issue was obviously very important to defense counsel, who immediately objected to that line of questioning and requested a mistrial, based upon lack of disclosure of that information in discovery. RP 215.

The issue is not so much as to whether N.M. was questioned pre-trial about these allegations, but rather focuses on the preparedness of trial counsel to deal with those allegations during trial, and his pre-trial preparation (or lack thereof) in being alerted to

those allegations. It is clear that defense counsel was not aware that the mention of pornographic images on the computer had been mentioned in the police reports furnished as part of discovery. RP 217-219. Thus, it is fair to assume that no work had been done in anticipation of trial to counter these damaging allegations.

The above ties in with the Petitioner's concern that no effort was made by defense counsel to obtain the computer in question to determine the existence or non-existence of such images on the computer itself. This goes far beyond a mere failure to investigate and/or legitimate trial tactics, but rather challenges the entire line of defense by defense counsel. Evidence of this comes directly from the mouth of defense counsel, who clearly demonstrates a lack of knowledge of the contents of discovery. His repeated claims that "the burden is on the State" grow weary in the face of his obvious deficiencies in failing to have adequately investigated the case on behalf of his client.

Failure to Investigate and Consult Experts

The same logic applies to the clear failure on the part of defense counsel to have consulted with and/or called as witnesses experts in several areas relevant to this case. Again, the evidence of this failure comes not just from concerns on the part of the Petitioner herein, but from the very words and conduct of trial counsel during the trial itself.

A. Computers: As previously stated above, had defense counsel been aware that the issue of pornographic images on the computer was going to arise at trial (which he obviously was not), it would have been the professionally prudent and required thing to do to have made **some** effort to identify the computer at issue and have it tested.

There was no evidence of any such efforts.

B. Medications: It was obviously important to defense counsel that the jury be aware that the Defendant was taking Wellbutrin, and that the jury know the effects of that drug. By defense counsel own admissions in open court, set forth in detail in the original Petition herein, he was intending to elicit testimony as to the effects of the medication in question through either Ms. Modrow or Deputy Fitzgerald, or both. When the State's objections to this were upheld, defense counsel had only the Defendant to testify as to those side effects. Here again, as before, is an instance where a particular part of the defense theory (which obviously was important to defense counsel) was left largely untouched, due to the failure of defense counsel to have a defense expert available for such testimony. There is no indication at all that such an expert was ever consulted.

Medical Issues Concerning N.M.: The same analysis applies to the medical issues (or lack thereof) regarding N.M. While defense counsel did argue the lack of physical findings in closing argument (RP 689), he again cloaked the argument in terms of the entire burden being on the State. How much more powerful would it have been for the defense to have presented an expert to testify that the number of and type of alleged sexual assaults allegedly committed upon N.M. by the Petitioner would have left some degree of physical evidence? Yet, there is no evidence of any attempt by defense counsel to call such a witness or ever to have consulted with one.

The important fact in the instant case is that defense counsel himself makes much of these points in his remarks to the court and in his remarks to the jury. Yet he was completely unprepared to address them in any meaningful way for the Petitioner's

defense, whether due to lack of understanding of what was in the provided discovery, or due to lack of meaningful investigation and trial preparation.

Failure to Put Tapes Into Evidence

A review of the entire record in this case indicates, without question, the tremendous importance of the two intercepted and recorded telephone conversations between the Petitioner and N.M. in this case. As is often the case with allegations of this nature, the jury's questions come down to issues of credibility, as the alleged victim says the incidents did happen, and the defendant states they did not. There was virtually no physical evidence in this trial which militated one way or the other, and only two witnesses (N.M. and the Defendant Dobyns) had first hand knowledge of the alleged events.

The State is at least willing to concede that trial counsel was "deficient" in failing to introduce the tapes into evidence, but dismisses the claim due to the supposedly "overwhelming" evidence against the Defendant. As pointed out earlier, this case came down to one person's word against another's. Defense counsel exhortations to the jury in closing to listen to the tapes in the jury room simply exacerbated the error that he committed, and deprived the jury of critical evidence in the case.

Cross Examination of Detective Buster

Simply put, the cross examination of Detective Buster, set forth extensively in the original Petition herein, was the clearest example of ineffective assistance. Rather than simply establishing the Detective Buster had no personal knowledge of the events (a point

established early on in the cross examination), defense counsel pushed and pushed regarding the detective's "suspicions" and "gut feelings".

The damage to the defense case of this line of questioning, given the lack of other significant evidence at all, is clear and staggering. There was **absolutely no legitimate strategic trial tactic** in pursuing this line of questioning with Det. Buster. It was completely unnecessary, and devastating to the defense case, clearly falling below any objective standard of professionalism.

Prejudice and Cumulative Error

While it is submitted that any one of the areas of ineffective assistance of counsel outlined above would, on its own, give rise to a finding of prejudice and the need for a new trial, it is also submitted that the doctrine of cumulative error is operative in this setting as well, and that the cumulative effect of the errors and omissions of trial counsel, viewed together, create clear prejudice. As the Court of Appeals stated in *State v.*

Venegas, 155 Wn. App. 507, 228 P. 3d 813 (2010):

Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant her right to a fair trial, even if each error standing alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. See *Weber*, 159 Wn.2d at 279.

Without Detective Buster's ill-elicited opinion as to the Defendant's guilt, it is quite likely that the jury would not have been able to properly find, beyond a reasonable doubt, that the Defendant had committed the acts described and alleged by the State.

Taken together, and viewed as a whole, the deficient performance of trial counsel


prejudiced Defendant Dobyns, and he I entitled to relief as a result thereof.

C. CONCLUSION AND PRAYER FOR RELIEF

Based on the arguments set forth herein, this court should grant the Petitioner's Petition and remand his cases for a new trial or, at the very least, for an evidentiary hearing as to the allegations of ineffective assistance of counsel herein, pursuant to the rationale set forth in *Moore v. United States*, 432 F. 2d 730 (3rd Cir. 1970), cited at length in the initial pleading herein.

DATED this 21st day of December, 2011.

Respectfully submitted,



ROBERT M. QUILLIAN,
Attorney for Petitioner
WSBA #6836

FILED
COURT OF APPEALS
DIVISION II
11 DEC 22 AM 10:53
STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE

I certify that I mailed a copy of the Personal Restraint Petition by depositing same in the United States Mail, first class postage prepaid, to the following people at the addresses indicated:

Ms. Sara I. Beigh
Deputy Prosecuting Attorney
345 W. Main St., 2nd Floor
Chehalis, WA 98532

Mr. Robert M. Dobyns
#319952
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

DATED this 21st day of December, 2011.



ROBERT M. QUILLIAN, WSBA #6836
Attorney for Petitioner